

**Borden, Inc. and Local 222, International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Cases 27-CA-10412, 27-CA-10412-2, and 27-CA-10412-3

July 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

At issue is whether the Respondent violated Section 8(a)(5) and (1) when, after consolidating two units represented by the Union, it, without bargaining, applied the terms and conditions of one of the original units to all of the employees in the consolidated unit.

On January 24, 1990, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record<sup>2</sup> in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order, as modified.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally imposing terms and conditions of employment previously in effect at its newly acquired Farmer Jack milk processing plant on represented employees transferred there from its Meadow Gold milk processing plant. The Union was the collective-bargaining representative of employees at both the Farmer Jack plant and the Meadow Gold plant, but the employees constituted separate units with separate bargaining histories, and the contracts covering the two groups of employees differed. Before the two operations were consolidated, the Meadow Gold transferees had worked under an agreement with terms that were significantly more favorable for the employees.<sup>3</sup>

The judge found that the two units of employees became a single, consolidated unit at some point after the consolidation. He found no merit, however, to the General Counsel's contention that the Respondent had violated Section 8(a)(5) because it had not preserved

the separate status of each portion of the new consolidated unit and applied the Farmer Jack contract to employees who had worked at the Meadow Gold or at the Farmer Jack plants.

We agree with the judge's findings that a new unit was created by the consolidation of the Meadow Gold and Farmer Jack units, that the Meadow Gold employees were in fact transferred to the Farmer Jack plant, and that the Respondent lawfully assumed the contract in effect at Farmer Jack, at the Union's request, after it purchased that plant.<sup>4</sup>

We disagree, however, with the judge's finding that the Respondent had no obligation to preserve the Meadow Gold transferees' preexisting terms and conditions of employment while the parties bargained in good faith to agreement or impasse with respect to the consolidated unit. The pertinent facts are as follows.

The Respondent acquired the Farmer Jack plant from Borman's Acquisition Corporation shortly after Borman's had obtained substantial monetary concessions from the Union. It had purchased the Meadow Gold plant the prior year when that plant's employees were covered by a collective-bargaining agreement that had been negotiated with the Union by then-owner Beatrice Companies, Inc. Wages and benefits under Beatrice's Meadow Gold contract were superior, from the Union's perspective, to those covering Borman's Farmer Jack unit.

From the outset of negotiations on October 12, 1987, when the contemplated purchase of Meadow Gold was announced,<sup>5</sup> the Respondent told the Union it intended to consolidate the plants, but that it would initially operate them independently. The Respondent stated that it would assume the Farmer Jack contract at the Farmer Jack plant. The Union took the position that, if the plants continued to operate independently,

<sup>4</sup> We also adopt the judge's findings that the Farmer Jack unit was not an accretion to the former Meadow Gold unit; the Respondent, through its general manager, Anthony Ward, violated Sec. 8(a)(5) and, independently, Sec. 8(a)(1), by promising Meadow Gold clerical employees increased benefits if they abandoned the Union; the Respondent did not violate Sec. 8(a)(3) and (1) by the layoffs and transfers to Farmer Jack of former Meadow Gold employees; and the Respondent violated Sec. 8(a)(5), but not independently Sec. 8(a)(1), by the threat to lay off or refuse to transfer employees unless the Union accepted the Respondent's last bargaining offer.

Member Devaney would delete the fourth paragraph of the notice concerning the Respondent's obligation to refrain from making "misstatements or mischaracterizations regarding negotiations" by the Board. Accordingly, Member Devaney would also find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(5) by stating to employees that it would have no choice but to lay off and/or refuse transfers to employees unless the Union accepted its last bargaining offer, as this finding is cumulative of other unfair labor practices found by the Board and would not affect the remedy.

<sup>5</sup> The judge found that these negotiations could be fairly characterized as either effects bargaining over the Meadow Gold cessation of operations or bargaining concerning the new merged unit.

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the Union.

<sup>2</sup> The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> The term of the Meadow Gold contract ran from May 1, 1987, to November 1, 1990. The Farmer Jack contract, which had been negotiated by a predecessor but was assumed by the Respondent (see fn. 5 *infra*), was a 5-year agreement running from April 10, 1987, to April 30, 1992.

it expected the Respondent to honor both contracts,<sup>6</sup> but that, in the event of consolidation, the Meadow Gold contract should apply to employees from both units thereafter. The parties discussed, but reached no agreement over, the possibility of constructing a dual wage and benefit system at the consolidated facility.

On November 6, 1987, the Respondent formally acquired the Farmer Jack plant. The next day, it commenced operations, recognized the Union in the unit covered by Borman's Farmer Jack collective-bargaining agreement, and began applying that contract at Farmer Jack. On November 10, the Respondent again met with the Union, announced its intention to proceed with the consolidation, and offered to bargain over the effects of the cessation of the Meadow Gold milk processing operations. At further bargaining sessions on January 5 and 6, the Respondent set July 1988 as its projected date to terminate the Meadow Gold operations. After further bargaining, the Respondent agreed to union proposals for transfer rights for Meadow Gold employees choosing to work at Farmer Jack and retention of seniority for those employees. It consistently, however, rejected the Union's proposal to apply Meadow Gold wage rates to employees transferred to Farmer Jack.

Ultimately, the Respondent accelerated the transfer of operations and selectively employed Meadow Gold unit employees at the Farmer Jack facility without seniority rights and at wage and benefit rates specified in the Borman's contract it had assumed at Farmer Jack.<sup>7</sup> When the consolidation was complete, October 7, 1988, there were 35 former Meadow Gold plant employees, 31 Farmer Jack employees previously covered by the Borman's contract, and 13 new hires. The Borman's contract was applied to all 79 of these employees.

As a result of the consolidation, a new merged unit, different from either preexisting unit, was created at the Farmer Jack plant.<sup>8</sup> The judge found no obligation for the Respondent to maintain the Meadow Gold wage and benefit rates at the Farmer Jack plant on consolidation and recommended dismissal of the corresponding and related allegations. The General Coun-

sel excepts, contending that the Respondent is obligated to maintain the status quo terms and conditions of employment of both previous units in effect at the time of consolidation while the parties bargain for a new agreement for the merged unit. The General Counsel maintains that this entails no expansion of an employer's obligations under Section 8(a)(5) because the requirement for a successor employer to preserve the status quo during bargaining is well established. In any event, the General Counsel argues, to require maintenance of a bifurcated status quo ante in the case of a consolidation, as here, fosters stability in collective bargaining. The General Counsel further contends that certain former Meadow Gold production employees who accepted early retirement "as a direct result" of the Respondent's unlawful unilateral action were thereby constructively discharged.

The Respondent insists that the former Borman's contract in effect at Farmer Jack constitutes the status quo for the combined unit of employees. First, the Respondent argues that requiring two groups of employees to work alongside each other with dual wage and benefit structures would work against the statutory objective of industrial stability because dissension in the workplace would inevitably flow from decreased employee morale among the lower paid group. Second, according to the Respondent, representation of both groups of employees in negotiation of a new contract presents the Union with a conflict of interest. Finally, the Respondent points out that, if the Board finds merit in the General Counsel's theory of violation, "it would be granting the Union the terms of its proposal to Borden."

Our rejection of the Respondent's contention that the Meadow Gold employees should automatically be brought under the terms of the Farmer Jack contract is substantially consistent with the manner in which the Board has treated the obligation of an employer respecting the terms and conditions of previously unrepresented employees who are added to a bargaining unit as a result of an *Armour-Globe* election<sup>9</sup> during the term of a collective-bargaining contract covering the larger unit. The newly added, or "fringe group," employees are not automatically swept under the terms of the agreement covering the existing unit. *Federal-Mogul Corp.*, 209 NLRB 343 (1974). Accord: *Wells Fargo Armored Service Corp.*, 300 NLRB 1104 (1990); *Bay Medical Center*, 239 NLRB 731, 732 (1978). Rather, the union and the employer bargain over the terms and conditions under which the fringe group will work until the contract in the larger unit expires, and the status quo from which they bargain is the current working conditions of those employees. *Federal-Mogul*, 209 NLRB at 344. See also *NLRB v.*

<sup>6</sup>The judge found that, by the November 12, 1987 letter, the Union agreed unconditionally to the Respondent's assumption of the Borman's Farmer Jack contract at that facility, including wage increases scheduled under that contract. As noted in fn. 4, supra, we adopt the judge's dismissal of the 8(a)(5) complaint allegation that the Respondent unilaterally assumed the Borman's contract.

<sup>7</sup>As noted above, we adopt the judge's finding that these employees were effectively transferred from Meadow Gold to Farmer Jack.

<sup>8</sup>See *Martin Marietta Co.*, 270 NLRB 821 (1984). Because the two preconsolidation units in Martin Marietta had been represented by different unions, a question concerning representation arose, and the Board accordingly directed an election on the employer's RM petition in the consolidated unit. Because both groups of employees in the present case are represented by the same union, no such question arises.

<sup>9</sup>*Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942).

*Henry Vogt Machinery Co.*, 718 F.2d 802, 809 (6th Cir. 1983) (employer permitted laboratory employees who had voted to join existing unit to retain cafeteria privilege during bargaining over whether that privilege should be retained now that they were in unit of others who did not enjoy it). Admittedly, the present case differs in that we have determined that the consolidated operation at Farmer Jack was a new unit and not a mere continuation of an existing unit with a newly added contingent. Therefore, unlike in *Federal-Mogul* and its progeny, we have concluded that a new agreement should be negotiated for the entire new operation. But, here, as in *Federal-Mogul*, we see no “legal or practical justification for permitting either party to escape its normal bargaining obligation,” which is to bargain with the employees’ previous conditions of employment as the starting point. 209 NLRB at 344.<sup>10</sup>

We agree with the General Counsel that, where two separate units of the same employer represented by the same union contribute substantial proportions of employees to a new unit, an employer is obligated to preserve the status quo with respect to each of the two groups until it reaches either a new agreement or a bargaining impasse. Maintaining the status quo by requiring the terms of both contracts to remain in effect after a consolidation, such as the one that occurred here, promotes the statutory interest of stability in collective bargaining. Maintaining the status quo ensures that both portions of the merged unit begin from the same relative point. Like any employees in a prebargaining posture, they both enter negotiations with their respective preexisting terms and conditions of employment intact.

Contrary to the Respondent’s argument that a bifurcated status quo would promote industrial unrest, our experience and judgment leads us to conclude that it is more likely to prompt both parties to negotiate an agreement expeditiously. Thus, each will be motivated to reach agreement to forestall the continued application of the contract that each party views as the less desirable one. As to the Respondent’s contention that the Union faces a conflict of interest where different portions of a unit enjoy different wages and benefits even temporarily, we find this situation at least comparable to the dual-tier bargaining structures which have been routinely advanced as employer proposals in numerous industries and have frequently thereafter been agreed to and administered by unions without

disqualifying conflicts of interest. There may be circumstances in which there is practical justification for not requiring an employer to adhere to two different sets of employment terms and conditions covering, respectively, two different groups of employees newly joined in a single unit, until the employer negotiates a new single contract for the unit. We find, however, that the Respondent has presented no justification here for unilaterally terminating the Meadow Gold employees’ terms and conditions before bargaining for a new agreement.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of Meadow Gold employees transferred to the Farmer Jack facility and compensating them at Farmer Jack contract rates. Correspondingly, we find that those former employees of the Meadow Gold plant, who declined employment at Farmer Jack and retired because of those changes, were constructively discharged. Those employees, facing the prospect of reduced pensions through lower employer pension-benefit contributions and loss of seniority working under the Borman’s Farmer Jack agreement, were offered a Hobson’s choice between continued employment by the Respondent or abandonment of rights guaranteed them under the Act.<sup>11</sup> We agree with the General Counsel that the issue of these constructive discharges was fully and fairly litigated and find that they violated Section 8(a)(3) and (1) of the Act.<sup>12</sup>

#### THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make employees whole for losses they suffered as a result of the Respondent’s failure to apply terms and conditions of the contract in effect at the Meadow Gold plant for the term May 1, 1987, to November 1, 1990. The loss of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enf’d. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall remit all payments owed to the employee benefit funds and reimburse their employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf’d. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent’s failure to make these payments. Any amounts that the Respondent

<sup>10</sup> In *NLRB v. Abex Corp.*, 543 F.2d 719 (9th Cir. 1976), the court of appeals declined to apply the *Federal-Mogul* holding in a case in which the fringe group performed work that was “functionally similar” to that performed by employees in the preexisting unit. The Board, however, has continued to apply the doctrine even when both groups of employees perform the same type of work. *Bay Medical Center*, 239 NLRB 731 (1978) (“Mercy Division” LPNs did not automatically come under contract of “General Division” LPNs following *Armour-Globe* election).

<sup>11</sup> See *Superior Sprinkler*, 227 NLRB 204, 210 (1976).

<sup>12</sup> We leave to compliance the determination of the number and identity of former Meadow Gold employees who took early retirement rather than accept employment under unlawfully changed conditions at the Farmer Jack plant.

must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Nothing in our order, however, should be construed as requiring the Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging employees who accepted early retirement from its Meadow Gold facility, rather than be transferred to its Farmer Jack facility, we shall order the Respondent to offer them positions at the Farmer Jack plant and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set out in full below, and orders that the Respondent, Borden, Inc., Salt Lake City, Utah, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Offering employees increased benefits if they abandon union representation.

(b) Dealing directly with employees concerning terms and conditions of employment of unit employees, thereby undermining the role of the Union as the exclusive representative of unit employees for the purpose of collective bargaining.

(c) Failing to bargain in good faith with Teamsters Local 222, AFL-CIO as the exclusive representative of employees in the following unit:

All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and Central and Southern Conference of Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

(d) Unilaterally altering the status quo of unit employees transferred between plants.

(e) Terminating employees or otherwise discriminating with regard to their wages and terms and conditions of employment because of their union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the Meadow Gold plant employees who accepted early retirement, rather than work under the terms and conditions of employment of the Borman's Farmer Jack collective-bargaining agreement, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at the Farmer Jack plant, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the transfer of operations from the Meadow Gold plant. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable time to accept such offers.

(b) Make the Meadow Gold transferees and early retirees whole for any loss of earnings and other benefits suffered in the manner set forth in the remedy section of this decision.

(c) On request of the Union, rescind any departures from terms and conditions of employment affecting former Meadow Gold employees that existed immediately before the Respondent's transfer of operations to the Farmer Jack plant, retroactively restoring pre-existing terms and conditions of employment, including wage rates and benefit plans.

(d) Recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit set forth above.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Meadow Gold and Farmer Jack plants and mail to the last known address of all former employees of the Meadow Gold plant in the appropriate bargaining unit represented by Local 222, International Brotherhood of Teamsters, AFL-CIO, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's au-

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thorized representative, shall be posted and mailed by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT promise, directly or implicitly, improved terms and conditions of employment if employees abandon Local 222, International Brotherhood of Teamsters, AFL-CIO as their representative for collective bargaining.

WE WILL NOT bypass the Union and deal with employees directly concerning terms and conditions of employment or other matters properly the responsibility of the Union.

WE WILL NOT make misstatements or mischaracterizations regarding negotiations or the consequences of agreements or disagreements with the Union. More specifically WE WILL NOT tell employees that unless the Union accepts our last offer regarding employee transfers to the Farmer Jack facility, we will be forced to deny employees transfers and will further be forced to lay off employees at the Meadow Gold plant and hire new employees "off the street" at the Farmer Jack facility.

WE WILL NOT unilaterally alter terms and conditions of employment of unit employees transferred between plants.

WE WILL NOT terminate employees or otherwise discriminate against them with regard to their wages and terms and conditions of employment because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL recognize and bargain in good faith with the Union as the exclusive representative of our employees in the following unit which resulted from the merger of the represented units at the Meadow Gold and Farmer Jack facilities.

All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and Central Southern Conference Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

WE WILL offer Meadow Gold plant employees who accepted early retirement, rather than elect to work under the terms and conditions of employment of the Borman's Farmer Jack collective-bargaining agreement, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at the Farmer Jack plant, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the transfer of operations from the Meadow Gold plant. If there is an insufficient number of jobs for all the employees to be offered reinstatement, WE WILL place the names of those for whom jobs are not available on a preferential hiring list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired.

WE WILL make Meadow Gold plant transferees and early retirees whole for any loss of earnings and other benefits they have suffered.

## BORDEN, INC.

*William J. Daly, Esq.*, for the General Counsel.  
*William F. Schoberlein, Esq. (Sherman and Howard)*, of Denver, Colorado and *Keith King, Esq.*, Corporate Labor Counsel, of Columbus, Ohio, for the Respondent.  
*Stephen W. Cook and Reid Davis, Esqs. (Cook and Wilde)*, of Midvale, Utah.

## DECISION

### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in trial at Salt Lake City, Utah, on September 13, 14, and 15, 1989. Posthearing briefs were filed on November 13, 1989. The matter arose as follows.

On February 26, 1988, International Brotherhood of Teamsters, AFL-CIO (the Charging Party or the Union) filed a charge against Borden, Inc. (Respondent) docketed as Case 27-CA-10412. On March 11, 1988, the Union filed a second charge against Respondent docketed as Case 27-CA-10412-2 and on April 7, 1988, a third charge docketed as Case 27-CA-10412-3. Following an investigation, on June 15, 1989, the Regional Director for Region 27 of the National Labor Relations Board issued an order consolidating cases, consoli-

dated complaint, and notice of hearing concerning the three cases.

The complaint alleges and the answer admits that Respondent acquired two dairy plants in Salt Lake City, Utah—the Meadow Gold facility and the Farmer Jack facility, ultimately closing the Meadow Gold facility and merging operations into the Farmer Jack facility. The complaint further alleges and the answer admits that the Union represented certain employees at each plant during relevant times.

The complaint alleges and the answer denies that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by telling employees at the Meadow Gold facility that they could not be transferred to the Farmer Jack facility unless the Union accepted Respondent's contract proposals. The complaint further alleges and the answer denies that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Meadow Gold employees and rehiring certain of these employees as new hires at the Farmer Jack facility. Finally, the complaint alleges and the answer denies that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively with the Union by the following acts and conduct: (1) by unilaterally implementing the predecessor's collective-bargaining agreement at the Farmer Jack facility in and after November 1987, (2) by unilaterally changing the terms and conditions of Meadow Gold employees by applying the Farmer Jack terms and conditions of employment to Meadow Gold employees employed at the Farmer Jack facility, and (3) by bypassing the Union and dealing directly with Meadow Gold clerical employees by offering them improved wages and benefits if they agreed to work without union representation at the Farmer Jack facility.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs.

On the entire record herein, including helpful briefs from all parties, and from my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT<sup>1</sup>

##### I. JURISDICTION

At all times material, Respondent, a corporation with an office and place of business in Salt Lake City, Utah, has been engaged in the production and wholesale sale of milk products. Respondent in the course and conduct of its business operations in Utah annually sells and ships as well as purchases and delivers goods and services valued in excess of \$50,000 directly to and from locations outside the State of Utah. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> As a result of the pleadings, the stipulations of counsel at trial and the submission of a substantial number of joint exhibits, there were few disputes of fact concerning events. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible testamentary and documentary evidence.

## II. LABOR ORGANIZATION

The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

Corporate America has been experiencing a restructuring resulting from the acquisition of, subsequent reorganization and in some cases dismemberment of corporations through mergers, acquisitions, sales, and divestitures. The instant case involves the consequences of this process in the dairy industry in the State of Utah. A brief history of the industry in Utah and the two facilities involved herein is appropriate.

##### 1. The milk production and distribution process in Utah

Until the events described herein, three entities produced and distributed the bulk of dairy products in the State of Utah: Safeway Stores, Inc., Beatrice Foods, Inc., and Western General Dairies, Inc. The production employees of each entity were represented by the Union. Respondent, a national corporation principally engaged in the processing, preparation and sale of food and other consumer products, was not a factor in the Utah dairy industry.

##### 2. History of the Meadow Gold facility

The Meadow Gold facility is a dairy products processing and distribution facility located in Salt Lake City, Utah. Until 1986, the Meadow Gold facility was owned and operated by Beatrice Companies, Inc. (Beatrice) as one of many facilities in its Meadow Gold Dairy Division. The facility's employees were represented by the Union and were covered by: (1) a master agreement covering various Meadow Gold Dairy Division facilities nationwide between Beatrice and the International Brotherhood of Teamsters, AFL-CIO (the International), and (2) by regional and subregional contract addenda covering smaller geographical areas negotiated by the employer and various sub organizational units of the International including the Union.

In 1986, Beatrice was acquired by investors in a leveraged buyout through the offices of the firm of Kohlberg, Kravis, and Roberts and certain of Beatrice's assets and divisions were put up for sale. Respondent contemplated the purchase of Beatrice's Meadow Gold Dairy Division but determined that its collective-bargaining structure was unsatisfactory. Respondent met with the International and entered into an interim labor agreement on October 9, 1986, which was to replace the Beatrice master contract. The parties further agreed that new local addenda would be negotiated as existing local agreements expired with a pattern agreement to be negotiated at the first opportunity.

Respondent thereafter acquired the Meadow Gold Division including the Meadow Gold facility. At the time of acquisition Beatrice was negotiating the State of Utah addendum to the former master contract with the Union. The Meadow Gold facility was covered by the agreement. Respondent took over the negotiations and, after an initial rejection by employees, an agreement was reached and ratified by the mem-

bership in May 1987.<sup>2</sup> The contract covers the period May 1, 1987, through November 1, 1990.

### 3. History of the Farmer Jack facility

In late 1986, Safeway Stores, Inc. was also acquired by investors in a leveraged buyout with the assistance of Kohlberg, Kravis, and Roberts and certain of its assets put up for sale. The International and its locals represented various Safeway employees nationwide and were signatory to various collective-bargaining agreements. The experience of the International on at least one occasion prior to the events in question herein was that, if the unions representing Safeway employees resisted granting substantial contractual concessions to potential purchasers, Safeway's operations were not necessarily purchased and operated in divisional units, but were rather either simply closed down or sold on a piecemeal basis with a concomitant loss of represented employees' jobs.

Safeway's Utah Division—including plants, retail outlets, distribution center, warehousing, and trucking operations were for sale and, if not sold as an operating unit, were, in the International's view, at risk of closure. In this setting, Borman's Acquisition Corporation (Borman) approached the International and told them that Borman was considering the purchase and continued operation of the Utah Division as a unit but that substantial contractual concessions from the representing labor unions would be necessary to make the purchase practicable. Very substantial monetary concessions exceeding \$2000 per worker year were obtained by Borman from the Union in a new 5-year agreement entered into on April 10, 1987, and expiring on April 30, 1992. Thereafter, Borman acquired and operated the Utah Division facilities including the Farmer Jack facility in Salt Lake City, Utah.

Borman began to experience financial difficulties and considered the sale of its Farmer Jack plant. In July 1987, Respondent contemplated the acquisition of the Farmer Jack facility, an equivalent but more modern plant than its Meadow Gold facility which would better allow expansion. Such an acquisition would allow eventual consolidation of the Meadow Gold and Farmer Jack operations at the Farmer Jack facility. In late September 1987, Respondent and Borman signed a letter of intent respecting Respondent's purchase of the Farmer Jack facility.

At a meeting held on October 12, 1987, between representatives of Respondent, Borman and the Union, Respondent notified the Union of its intent to acquire the Farmer Jack plant and to assume its collective-bargaining agreement. Respondent further indicated that, at least for a period, the Farmer Jack and Meadow Gold plants would operate independently, but would ultimately be consolidated at the Farmer Jack facility.

Union representatives took the position that, if the facilities were run independently, their contracts could be separate. If, however, the plants were to be consolidated, the Meadow Gold contract—which was superior from the labor organization's perspective—should apply. Borman's representative expressed concern that such an arrangement could cause problems under the purchase agreement between Re-

spondent and Borman.<sup>3</sup> The possibility and difficulties of maintaining dual wage and benefit rates at the consolidated facility were also discussed without agreement. The meeting ended with the parties agreeing that they were at a purely exploratory stage and that Respondent would submit a proposal to the Union.

On November 6, 1987, Respondent formally acquired the Farmer Jack plant. On November 7, 1987, it began operations retaining all Borman employees and recognizing the Union as representative of unit employees.<sup>4</sup> At all times material herein, Respondent has applied the terms of the April 10, 1987 Borman agreement to the Farmer Jack facility employees including the granting of scheduled increases in wages, pension contributions and other benefits which fell due under terms of the contract after November 6, 1987. The pension trusts, however, are not accepting the increased payments tendered by Respondent.

### B. Initial Negotiations Following Acquisition of the Farmer Jack Plant

On November 10, 1987, Respondent's corporate director of labor relations, Jack McNerney, and assistant director of labor relations, Neil Finnerty, met with representatives of both the Union and the International. Respondent's representatives confirmed its acquisition and operation of the Farmer Jack facility, its retention of Borman Farmer Jack unit employees, its recognition of the Union, its intention to assume and apply the Borman contract and its intention to consolidate the Meadow Gold and Farmer Jack operations at the Farmer Jack facility. Respondent also expressed a willingness to negotiate respecting the effects of the closure of the Meadow Gold plant. No agreement of any kind was reached at this meeting.

On November 12, 1987, the Union sent Respondent's representatives a letter with the following language:

The purpose of this letter is to request an immediate meeting to negotiate the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale. Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

Respondent and the Union held negotiations respecting the two plants on January 5 and 6, 1988. At these meetings, Respondent announced that the consolidation of the two plants at the Farmer Jack facility and the closure of the Meadow Gold facility were to take place by July 1988. Respondent's position respecting the Farmer Jack unit was that, when Re-

<sup>2</sup>The contract had not been signed as of the time of the hearing in the instant case. There was no dispute, however, respecting the terms of the agreement relevant herein.

<sup>3</sup>The purchased agreement provided for the long-term sale of dairy products by Respondent to Borman's Salt Lake Division retail facilities from the Farmer Jack plant. Product prices were established in accordance with a formula which included, inter alia, labor costs at the Farmer Jack plant.

<sup>4</sup>The pleadings establish the following unit as appropriate for bargaining under Section 9 of the Act and as the relevant Farmer Jack unit at least until the time of the merger:

All employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992.

spondent had acquired the plant, it had also “purchased the contract.” Discussion of provisions for the transfer of Meadow Gold unit employees to the Farmer Jack facility and the dovetailing of the seniority of employees in the two units took place.

The Union submitted a written proposal at the end of these negotiations which included in its provisions the proposed freezing or “red circling” of Meadow Gold employee contract wage rates as of the time of their transfer and the incorporation within the Farmer Jack contract of these red circled rates for the transferred Meadow Gold unit employees.<sup>5</sup> This proposal was not acceptable to Respondent and negotiations ended with an agreement to meet on January 13, 1988.

At the January 13, 1988 negotiations, Respondent proposed to accept the Union’s proposals respecting dovetailing of seniority and transfer of Meadow Gold employees to the Farmer Jack plant and further proposed increased transfer and severance payments to Meadow Gold employees. Respondent, however, specifically rejected the Union’s proposal to carry Meadow Gold wage rates along with Meadow Gold employees to the Farmer Jack plant even if only in the form of red circled rates. Respondent indicated it was determined to preserve the wage structure at the Farmer Jack Plant. Agreement was not reached. At no time thereafter did the Union submit Respondent’s offer to employees for consideration.

On January 27, 1988, Respondent announced to employees its intention to consolidate the facilities at the Farmer Jack facility. An employee grievance was filed thereafter challenging the action. Thereafter, in February and March, meetings were held with unit employees in which the move and its consequences were discussed, see separate discussion *infra*.

On March 29, 1988, the parties met again. The Union submitted a new proposal which would freeze Meadow Gold wage rates and accelerate Farmer Jack rates so that they reached a common level at the contract expiration date in 1992. Respondent did not accept the proposal retaining its position that the Borman contract rates would control at the Farmer Jack facility, with transfer and severance payments being paid to Meadow Gold employees without modification of the Farmer Jack wage structure. Respondent proposed increases in Meadow Gold employee transfer payments without union acceptance.

The parties met again in May and October 1988, and in the period immediately before the trial herein. No agreement has been reached on the issues concerning Meadow Gold employees or on a contract covering the Farmer Jack facility. To the time of the hearing employees at the Farmer Jack plant<sup>6</sup> were compensated at the rates provided under the Borman Farmer Jack contract.

<sup>5</sup>The Borman Farmer Jack rates, which were being followed by Respondent, were significantly lower than the Meadow Gold rates. Thus, if the Union’s proposal had been implemented, the Meadow Gold transferees would enjoy higher, if frozen, wage rates than the original Farmer Jack employees until the scheduled increases under the Farmer Jack contract raised the Farmer Jack wages to the level of the Meadows Gold transferees.

<sup>6</sup>Not including driver sales employees who were still covered by the Meadow Gold Contract.

### *C. Respondent’s Meetings with Employees*

In February 1989, Respondent held two meetings with Meadow Gold unit office employees in the office of the controller, Robert Lake. Respondent’s then general manager, Anthony Ward, discussed the specifics and timing of the upcoming consolidation and its consequences. Employees Catherine Joan Cherti and Wildea McDonald and General Manager Ward testified concerning the meetings.

There is no dispute that after the announcement of the move, discussion was held, questions were posed by employees and answered by management. The fact that the Meadow Gold clerical staff was part of the represented Meadow Gold bargaining unit and the fact that the Farmer Jack clerical employees were not part of the represented Farmer Jack bargaining unit and the implications of those facts were discussed. Ward told employees that when they moved they would not be covered by the union contract. Terms and conditions of employment of clerical employees at the two facilities was discussed. Ward testified:

As I recall, I expressed my personal opinion that I don’t feel the Union plays a constructive part in an office. And I felt that there would be more flexibility for the Company, more flexibility for the employees without a union office. And I expressed the feeling that a person may get or be rewarded more, based on their abilities, without a union office; or, again, it may be different. Union versus non-union, more flexibility, both ways, benefits for the Company, benefits for the employees. That was my personal opinion . . . I said a person could get higher benefits—higher pay. I didn’t say a person or they will get higher pay. I said there’s the flexibilities [sic] for reward more for performance.

Cherti testified that Ward

said as far as the office was concerned the Company didn’t believe in office being union. He himself didn’t believe in a union office. And if we didn’t have a union office that we would have more benefits, we would get more raises, the promotions would be better, and each one would be able to earn on their own merits rather than what the Union contract said that we would get.

McDonald generally corroborated the other’s testimony. She described Ward’s statements about wages as follows:

Mr. Ward himself did not see any need for a union, that we could have better pay—or not necessarily better pay, but—how was it he put it?—that we would receive more pay for our work if we did good work, you know, additional, like merit raises type. And where it is now with the union contract you have to wait until such and such date for your 25-cent or 50-cent, whatever the raise happens to be. And then you would also be advanced according to your work, you[r] skills and your interest in working, you know, showing that you are doing well.

Respondent’s January 1988 offer to the Union provided, *inter alia*, for the transfer of Meadow Gold employees to the Farmer Jack facility upon closure and the dovetailing of those employees’ seniority with Farmer Jack employees. As noted *supra*, the Union did not accept the proposal nor did



the Union submit the proposal to the unit employees for consideration. On February 29, 1989, the Union filed Case 27-CA-10412. A regular union membership meeting was scheduled for the evening of March 10, 1988. In this context, on March 9 and 10, 1989, Respondent convened two meetings of Meadow Gold unit employees.

The parties stipulated that at these meetings Respondent's representatives explained that they were not seeking to bargain with the employees. They explained Respondent's outstanding January 13, 1988 proposal and urged the employees to seek a vote on the proposal. They told the employees that the Union had informed Respondent that it did not accept the proposal and did not intend to submit it to the membership. Respondent's representatives told the employees that the proposal was Respondent's final proposal and, if agreement could not be reached with the Union on the proposal, Respondent would have "no choice but to layoff the employees at Meadow Gold, and hire from the street" at Farmer Jack. The parties further stipulated that employees learned at the meetings that, if the proposal was not ratified, or was not voted upon, then the employees would not be transferred, and they would have to apply as new employees at the Farmer Jack operation.

Also introduced into evidence was a detailed summary of the two meetings prepared by Respondent's agent. That memorandum indicated that Neil Finnerty, Respondent's assistant director of labor relations, told the assembled employees, *inter alia*, that:

[T]he proposal was still out there, and that the closing [of Meadow Gold] was coming and it would be necessary to hire off the street if some resolution of this problem was not forthcoming in the very, very, near future. [Finnerty] indicated that it would be impossible to transfer these individuals or pay them any severance without that being agreed upon by the Union. He further indicated that court battles were long-term propositions and that lawyers basically only fought over little words and that it was the people who would lose if they didn't transfer.

The memorandum further indicated that Finnerty, in answer to questions from employees, made the following statement respecting the Farmer Jack contract.

Remember that under the Farmer Jack contract we are duty bound to honor at that location there are some give backs of both the wages and benefits over the course of time.

. . . .

We are honoring the Borman contract at that location and because that was an essential part of the purchase of the Borman facility we need in order to effectuate the bargain period.

In answer to the question "Why don't you honor both contracts," the memorandum indicates Finnerty responded:

When we move we can't say both contracts are applicable to the location. We can't give you a job without this particular agreement being ratified [by the Union] and we'll have to hire off the street.

The circumstances of the union membership meeting of the evening of March 10, 1988, were not placed in evidence but, apparently, no vote on Respondent's proposal occurred. On March 13, 1988, an employee petition was filed with the International seeking a vote on Respondent's offer based on expressed employee concern for "our welfare and continuance of employment." On March 14, 1988, the Union filed Case 27-CA-10412-2.

#### *D. The Consolidation of Operations at Farmer Jack and the Closure of Meadow Gold*

The Union's statewide bargaining unit covered by its Meadow Gold contract with Respondent contained 135 employees just prior to November 7, 1987. The Farmer Jack bargaining unit on November 7, 1987, contained 35 employees. During the initial postacquisition period, because of the supply agreement negotiated as part of the purchase of the Farmer Jack facility, each facility operated much as before before supplying its existing customer base. In early 1988, however, Borman sold the remaining portions of its Salt Lake Division and the Farmer Jack plant lost a significant portion of its sales volume. This loss of volume made it impractical to operate both the Farmer Jack and the Meadow Gold facilities and a decision was taken in March 1988 by Respondent to accelerate the consolidation of the two facilities.

By March the move had been announced to employees and new supervisory appointments were made for the merging enterprises—in some cases placing one person in charge of a given position at both facilities. Equipment was moved from the Meadow Gold plant to the Farmer Jack plant over the period May to October 1988, in such a manner that various functions or processes were shut down, transferred and put back in operation independently of other processes. By October 7, 1988, the consolidation was complete and all production ceased at the Meadow Gold facility. As noted, clericals have remained at the Meadow Gold plant on an interim basis.

Respondent did not formally transfer its Meadow Gold employees to the Farmer Jack facility. Nor were seniority rights honored or any of Respondent's proposals respecting the transfer put into effect. With respect to at least selected employees, however, transfers were in fact made. Meadow Gold employees were solicited to contact a state employment officer as their work at Meadow Gold came to an end. Following a state interview, physical examination and pro forma Farmer Jack application process, the employees resumed employment, now at Farmer Jack, at their same or similar jobs utilizing the same equipment used at the Meadow Gold facility. Virtually no compensated time was lost by the employees transferring in this manner. The employee transfers, as with the equipment, occurred over the period in organizational units as particular parts of the operation at Meadow Gold were stopped, moved to Farmer Jack and then returned to operation. The transferred employees were formally classified and paid as new employees under the terms of the Borman Farmer Jack contract although they were credited with having had outside experience.

As of October 7, 1988, the Farmer Jack unit was comprised of 35 former Meadow Gold unit employees, 31 Borman Farmer Jack employees, and 13 employees—hired "off the street" since the acquisition from Borman. Nine su-

pervisors—at various levels of supervision—transferred from the Meadow Gold facility to the Farmer Jack facility.<sup>7</sup> Other Meadow Gold production employees took early retirement rather than transfer to the Farmer Jack facility.<sup>8</sup> Respondent continues to apply the Borman contract terms to all production employees at the Farmer Jack facility. Twenty-two clerical employees as of the time of the hearing remained at the Meadow Gold facility on an interim basis and 32 route driver salesmen were transferred to the Farmer Jack facility. These latter two groups of employees are still covered by the terms of the Meadow Gold contract.

#### E. Analysis and Conclusions

The General Counsel's pleadings do not allege broad bad-faith bargaining by Respondent with respect to either the Meadow Gold or the Farmer Jack units. Rather the General Counsel has alleged specific, narrow acts and conduct as violative of the Act. Further, the Charging Party contends that the Farmer Jack unit is an accretion to the Meadow Gold unit. In resolving the allegations it is appropriate to deal with the accretion issue first and thereafter to turn to the individual allegations of the General Counsel's complaint.

##### 1. The accretion allegation

The Charging Party argues that under either a theory of accretion or relocation, or both, the Farmer Jack unit merged with and became a part of the Meadow Gold multifacility unit as of the November 1987 date of Farmer Jack's acquisition by Respondent. The Charging Party argues further that the Meadow Gold contract, by virtue of the accretion, applies to all Farmer Jack unit employees. Respondent opposes the Charging Party's arguments. The General Counsel does not directly address the issue.

The Board finds an accretion, the automatic inclusion of one group of employees in an existing bargaining unit without consideration of the sentiments of the accreted group, where two circumstances exist. First, the employees to be included must be a relatively small number of employees compared to the group into which it is being subsumed. Second, the employees to be accreted must lack a sufficiently separate identity to exist independently as an appropriate bargaining unit and must have a sufficient community of interest with the accreting group so as not to render the new combined bargaining unit inappropriate. *Melbet Jewelry Co.*, 180 NLRB 107 (1969), *Safeway Stores*, 256 NLRB 918 (1981). These requirements flow naturally from the Board's preference for allowing employees the opportunity to express their sentiments concerning union representation. Where a unit of employees could under Board representational decisions stand independently of other bargaining units, it is not appropriate to include that potentially independent unit of employees in another bargaining unit without testing employee sentiment. Even where no independent bargaining unit

is appropriate under Board standards for the employees to be accreted, an accretion will not be found where the number of new employees is not sufficiently small relative to the number of employees in the existing unit so that the sentiments of the group to be accreted need not be fairly considered in determining the wishes of the overall unit.

An accretion normally occurs as of the creation of the new group of employees at issue. The Charging Party argues the accretion herein occurred as of the acquisition by Respondent of the Farmer Jack facility and retention of Borman's Farmer Jack employees on November 7, 1987. The Farmer Jack employees were certainly new to Respondent as of that date. The Charging Party argues that as of the time of the acquisition the Farmer Jack unit complement was 35 and the Meadow Gold 135. Thus, argues the Charging Party, the Farmer Jack employees were a relatively small proportion of the Meadow Gold unit.

The Charging Party further contends that the Farmer Jack unit had a close community of interest with the Meadow Gold unit and an insufficient independent community of interest to stand alone as a separate bargaining unit. Respondent argues to the contrary on brief at 33:

The Farmer Jack plant, which was of course a pre-existing bargaining unit, has little in common with the remaining parts of the Meadow Gold Unit. There is nothing in evidence to support the integration or commonality of conditions necessary to argue an accretion. The Union is arguing for lumping together operations which ordinarily would be treated separately under bargaining unit rules.

I have considered the evidence and arguments respecting the purported inability of the Farmer Jack unit to stand alone as an appropriate unit for bargaining under Section 9 of the Act. I agree with the Charging Party that the time of testing the appropriateness of the accretion is the date of acquisition. At this time both dairy facilities were in operation and it was foreseen that each would continue in operation at least for a reasonable period. I have also considered the Charging Party's skilled marshalling of evidence regarding the similarity of the work done at the two plants, their physical proximity and their place in Respondent's organizational structure. To the extent the Charging Party relies on developments caused by or occurring during the consolidation process, I have discounted such evidence as not relevant to the issue of accretion as of the date of the acquisition. Having considered the arguments of the parties and the record as a whole on the issue, I disagree with the Charging Party and find that the Farmer Jack unit could stand alone as a separate bargaining unit as of the time of the acquisition. I so find primarily because the Farmer Jack unit was not simply a new unit of employees without a history of collective bargaining or a separate identity of its own. While new to Respondent, the Farmer Jack facility was, as noted above, an existing operation which had been owned by two previous entities and was taken over by Respondent as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating. I do not believe that such a long operating entity may be easily held unable to exist independently as a separate bargaining unit. Given this finding,

<sup>7</sup> Apparently a significant number of supervisory employees returned to their former employer in the period following the acquisition of the Farmer Jack plant allowing for the ready placement of the Meadow Gold supervisory team at Farmer Jack.

<sup>8</sup> The lower pension contributions under the Borman contract had the potential effect of reducing the pensions of employees with long service under the higher contribution rates of the Meadow Gold contract.

I reject the Charging Party's contention that the Farmer Jack unit was an accretion to the Meadow Gold unit.<sup>9</sup>

The Charging Party also argues the accretion doctrine applies treating the instant case as a consolidation citing *Central Soya Co.*, 281 NLRB 1308 (1986). In that case, however, the Board looked to the consolidated facility, upon completion of the consolidation, to determine if a majority of employees came from the unit at issue. Such an analysis is also necessary here in light of my finding, *supra*, that the Farmer Jack unit may stand as a separate appropriate unit. In the instant case the Meadow Gold transferees never constituted a majority of the consolidated Farmer Jack unit. Accordingly, no accretion of the Farmer Jack unit into the Meadow Gold transferee unit under the *Central Soya* line of cases is possible.

The Charging Party also likens the instant case to a relocation citing *Marine Optical*, 255 NLRB 1241 (1981), *enfd.* 671 F.2d 11 (1st Cir. 1982); *Westwood Import Co.*, 251 NLRB 1213 (1980), *enfd.* 681 F.2d 644 (9th Cir. 1982); and *Harte & Co.*, 278 NLRB 947 (1986). The Board in *Harte*, at 948, set forth the following:

In relocation cases such as this one, our task is to distinguish situations where the new facility is basically the same operation, simply removed to a new site, from those where the new facility is somehow a different operation from the original. In the former case, a collective-bargaining agreement in effect at the old location is logically applied at the new one. In the latter, the old agreement has no place at the new facility. Given the complexity of modern business transactions, the determination of exactly what relationship the new plant bears to the old is not always easy to make. Nonetheless, we have developed standards in our contract-bar and failure-to-bargain cases to determine when there is a sufficient continuity of operations to justify applying an existing agreement to a new location. These cases hold that an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if the transferees from the old plant constitute a substantial percentage—approximately 40 per cent or more—of the new plant employee complement.

The difficulty with the Charging Party's argument here is that the Board in *Central Soya Co.*, 281 NLRB 1308 fn. 6, held "exclusively relocation" cases distinguishable from relocations which also, as here, involve consolidations. Given this distinction, I find that the instant case presents the test established in the quoted language immediately above. Applying that test, I find the new arrangements at Farmer Jack are not the same operations but are "somehow different" from either preconsolidation operation. Accordingly, I find the relocation arguments of the Charging Party are not controlling of the result herein.

<sup>9</sup>The Charging Party does not argue the accretion was effective at the time of the consolidation. Were the Charging Party to have done so, other factors, such as the significant changes in the circumstances of the dairy production employees in the Meadow Gold unit and the differing community of interests inherent in two groups of employees facing a consolidation of bargaining units would have defeated any accretion argument.

## 2. Complaint paragraph 12(a): The assumption of the Borman Farmer Jack contract

### a. *The positions and arguments of the parties*

There is no dispute that Respondent was a successor to Borman at the Farmer Jack facility and under Board doctrine was obligated to recognize the Union and maintain the status quo ante respecting employees' terms and conditions of employment pending agreement with or impasse in bargaining with the Union. There is also no dispute that Respondent had neither a right nor an obligation to assume the predecessor's contract with the Union. Further, it is undisputed that Respondent has, in effect, followed the Borman Farmer Jack contract's terms since its acquisition of the facility and, rather than simply freezing conditions as of the time of the acquisition, has made changes in employees' wages and fringe contributions after the acquisition to the extent these were scheduled in the Borman contract.

The General Counsel and the Charging Party contend that all changes in employee terms and conditions made after the acquisition were unilateral changes violative of Section 8(a)(5) and (1) of the Act and that Respondent has not simply preserved the status quo ante but rather improperly assumed the Borman contract. Respondent asserts three separate defenses. First, Respondent contends its following of the contract was no more than the maintenance of the status quo and that withholding the scheduled contract increases would have been itself a change in existing conditions. Second, to the extent its compliance with the contract is regarded as a change in the status quo, the changes were justified as post impasse last offer implementations. Finally, Respondent asserts that its actions were consistent with the Union's expressed desire that it follow the Borman contract.

The Charging Party argues that the Union's November 12, 1988 request that Respondent not alter the contract did not last forever and was retracted in subsequent bargaining. Thus, the Charging Party asserts that its subsequent contention that the Farmer Jack unit was an accretion to the Meadow Gold unit and was therefore covered by the Meadow Gold contract was inconsistent with and superseded the November 12 request. Respondent argues, however, that the Union in effect took inconsistent positions in bargaining, making accretion claims in its unfair labor practice charges and in the grievance process but not seeking changes in the Farmer Jack agreement for Farmer Jack employees and generally agreeing with the continuation of the predecessor agreement at the bargaining table with respect to those employees.

The General Counsel and the Charging Party also point out that Respondent during virtually all the negotiations maintained its position that it had "bought the contract" when it acquired the Borman facility. They note further that this same position was taken in Respondent's meetings with employees. This repeated assertion by Respondent's agents, argue the General Counsel and the Charging Party, should be credited and supports their position that the contract was in fact improperly assumed by Respondent.

### b. *Analysis and conclusion*

There is no dispute that Respondent was obligated to maintain the status quo and could not, without the agreement

of the Union, assume the Borman contract. There is also no doubt that Respondent has followed the contract's terms. I reject at the outset, the argument of Respondent that the honoring of the contract terms, including all in futuro scheduled changes in wages, pension trust payments, and other terms and conditions of employment, was simply maintenance of the status quo. Respondent's cited cases are inapposite for they do not address the assumption of a contract in its entirety, rather they address the different and subtler issue of the continuance of a practice of granting wage increases. The changes made in terms and conditions of employment after acquisition were in fact changes in the status quo ante. I also reject Respondent's second claim that the contract changes were justifiable as a post impasse implementation of its last offer. This defense is not viable since Respondent's implementation of the contract was a course of conduct undertaken from the time of its acquisition of the facility and was not initiated after some later argued impasse in bargaining.

That Respondent's conduct was agreed to by the Union or even done at the Union's request is a more substantial defense. As quoted, in its entirety, *supra*, the Union's November 12, 1987 letter to Respondent included the following:

Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

The letter asks that Respondent apply the contract without alteration. This request is clearly different from a request—consistent with Respondent's admitted legal obligation—to maintain the status quo. It is also true that Respondent in effect simply took the action requested of it in the letter.

I find that this union request, whether viewed as an initial request which justifies Respondent's conduct from its initiation or as a subsequent agreement which waives the Union's right to later object, is a valid defense to the General Counsel's allegation that unilateral changes were made when the contract was followed. While the status quo was not in fact maintained by Respondent and therefore changes were made in employees' working conditions, the changes were consistent with the Union's request and were therefore neither unilateral nor violative of the Act.

The Charging Party's contention that the Union request was withdrawn by the Union's subsequent conduct does not fail as a matter of law, but rather as a matter of fact. I agree that the Charging Party could have at anytime withdrawn its request that Respondent follow the terms of Borman's contract and that Respondent would thereafter have made any changes in working conditions at its peril. Such a retraction or withdrawal must in my view, however, be explicit to thereafter charge Respondent with knowledge that the Union's earlier request had been withdrawn. The Union could have specifically by letter or statement in bargaining withdrawn its earlier request. It never did so. The Union argues its later behavior made its new position clear. I do not believe the Union's overall conduct may be found to have retracted its letter of November 12, 1988. It would require a very strong and consistent course of conduct by the Union to support a finding that this later conduct withdrew the earlier written request that the contract be followed. Such clarity would be necessary to support a finding that Respondent at

some later point in the bargaining process violated the Act by continuing to apply the contract when it should have realized the Union's November 12, 1987 request was withdrawn by circumstances. Such clarity is lacking here.<sup>10</sup>

This finding is not modified by the fact that Respondent in its purchase agreement with Borman, and virtually throughout the course of bargaining and in meetings with employees, asserted the Borman contract had been "bought" with the facility and was in effect assumable as a matter of right by Respondent. This evidence supports a finding that Respondent was in fact acting as if the contract had been assumed, but this is not inconsistent with my findings above. Evidence of Respondent's assertions, assumptions or even motives does not address the issue of whether the conduct of Respondent was rendered not improper by the Union's request of November 12, 1987.<sup>11</sup> I have found changes were made. I have also found they were not unilateral because of the Union's request. Respondent's conduct is not relevant to this critical aspect of the case. Accordingly, based on all the above and the record as a whole, I find the General Counsel's allegation is not sustained by the evidence and I shall dismiss paragraph 12(a) of the complaint.

### 3. Complaint paragraph 12(b): The unilateral implementation of Farmer Jack terms and conditions on Meadow Gold employees working at Farmer Jack

There is no dispute that production employees from the Meadow Gold unit came to work at the Farmer Jack facility and that Respondent applied the terms and conditions of the Farmer Jack unit to them. Respondent contends that these transfers occurred simply as a result of the layoff of Meadow Gold unit employees and the subsequent and legally independent act of hiring those same individuals as Farmer Jack unit new hires. I find, based on the facts set forth, *supra*, that the moves were rather Respondent initiated transfers of employees, who, in effect, transferred along with their equipment and their work to the Farmer Jack facility as part of the consolidation of the Meadow Gold and Farmer Jack operations.

The General Counsel agrees with Respondent that the Meadow Gold and Farmer Jack units were separate until the time of employee transfers from Meadow Gold to Farmer Jack. Respondent contends that the now consolidated Farmer Jack unit remains conceptually unchanged and legally unaffected by the Meadow Gold closure and transfer of employees. The General Counsel argues that the substantial number or Meadow Gold transferees, both unit and supervisory, as well as the increased market for product at the Farmer Jack plant resulting from the Meadow Gold-Farmer Jack consolidation created a new and different third unit from the combination of the two older Meadow Gold and Farmer Jack units citing *Martin Marietta Co.*, 270 NLRB 821 (1984).

<sup>10</sup> The Union's February 1988 charge alleges unilateral changes at the Farmer Jack facility without greater specificity. The charge is not in and of itself a retraction of the letter of November 12, 1987. Nor does the fact that at some point the pension trusts no longer accepted pension contributions from Respondent convince me otherwise. It was up to the Union, in light of its clear request of November 12, 1987, to explicitly retract that request.

<sup>11</sup> In determining whether changes in working conditions violate Sec. 8(a)(5) and (1) of the Act, the employer's subjective good or bad faith is not relevant, *NLRB v. Katz*, 369 U.S. 736 (1962).

I agree with the General Counsel that the separate units of dairy production employees became a single unit, different from the two earlier units at some point in the consolidation. The General Counsel is not contending that either the Meadow Gold contract or the Farmer Jack contract under Borman applies to the new unit. There is no dispute that the Union represented the two former units and represents the current unit howsoever characterized. Accordingly, the question arises as to what possible consequence is the question of whether the current unit is the old Farmer Jack unit simply continuing on or a new unit resulting from a consolidation of the two older units?

The General Counsel's argument in support of a violation of paragraph 12(b) of the complaint is a novel one based on an interesting and apparently unprecedented analysis respecting the requirement of preservation of a bifurcated status quo ante in consolidated unit cases. The General Counsel contends that the fact that a new unit was created by the consolidation of the two previous units, as opposed to the unaltered continuation of the Farmer Jack unit at the Farmer Jack facility and the simple elimination of the Meadow Gold unit, means that Respondent was required to preserve the separate status quo ante of each portion of the new unit.<sup>12</sup> The General Counsel argues that since the new unit is a consolidation of two other units, the terms of employment applicable to each unit at the time of consolidation must be continued as would be the status quo ante in other more traditional situations. Thus, the "old" Farmer Jack unit employees and, presumably new "off the street" hires, should receive old Farmer Jack terms and conditions of employment and Meadow Gold unit transferees should receive their old Meadow Gold terms and conditions. If the General Counsel's theory is correct respecting Respondent's obligation to maintain the status quo ante of origin for Meadow Gold unit transferees, argues the General Counsel, then Respondent unilaterally changed Meadow Gold unit transferees' conditions of employment when it applied the Farmer Jack terms and conditions to them and, in so doing, violated Section 8(a)(5) and (1) of the Act.<sup>13</sup>

Respondent argues on brief that the General Counsel's theory in this regard is simply without binding precedent<sup>14</sup> and produces the anomalous result of a single unit represented by a single union in which there are two classes of employees each receiving completely different terms and conditions of employment. The General Counsel seeks to meet Respondent's arguments on brief at pages 29-30:

The parties should negotiate a new contract for the merged unit. And while the parties bargain, it is also reasonable that Respondent maintain the pre-existing

terms and conditions of employment of the employees. It was not the employees' decision to close the Meadow Gold plant and merge the operations. It was Respondent's decision. The employees should not be required to suffer different wages and terms and conditions of employment while the parties fulfill their statutory obligation to bargain in good faith. It is anticipated that the Respondent will argue that this result will require it to have employees in the same plant working under different terms and conditions of employment. However, this is not a situation designed to go on in perpetuity. These conditions would be maintained only while the parties bargain in good faith to agreement or impasse. Moreover, two-tier wage scales are not a concept foreign to labor relations. Nor are merit wage systems which result in employees working side-by-side but receiving different compensation. Respondent itself is not unfamiliar with situations where employees work under different, but simultaneous pension contribution rates [transcript citation omitted]. Thus, this is no justification for Respondent's avoidance of its statutory obligation to maintain pre-existing terms and conditions of employment.

I admit to being well taken with the General Counsel's theory and analysis. As noted, *supra*, in the analysis of the Charging Party's relocation arguments, see, e.g., *Harte & Co.*, 278 NLRB 947 (1986), if 40 percent or more of a new unit comes from an originating location, the old contract will be applied to the new unit. Consolidation cases, see, e.g., *Central Soya Co.*, 281 NLRB 1308 (1986), require majority transfer. Where two separate units of the same employer represented by the same union each contribute substantial proportions of the employees in a new unit, why should the employer not be obligated to preserve the status quo as to each group within the new unit until an agreement with the Union or an impasse in bargaining is reached?

I shall not, however, sustain the General Counsel's argument here. Howsoever a new argument or construction of law may appeal to an administrative law judge, it is the Board and courts which must fashion new law. What the General Counsel advances here is not mere judicial interpolation within the developing web of the law. The General Counsel seeks in my view the extrapolation of current bargaining unit doctrine to produce a new conceptual and definitional analysis which in turn creates new obligations on the parties in bargaining. The General Counsel seeks, through analysis however able and compelling, to expand the obligations of Section 8(a)(5) and (1) of the Act. The General Counsel must go to the Board, in my judgment, with such arguments for it is the Board and not its administrative law judges who is charged with the duty to interpret the Act and, as appropriate, expand its reach.

Having rejected the General Counsel's argument for obligating Respondent to maintain the status quo of Meadow Gold unit employees transferred to Farmer Jack positions, I find there was no obligation on Respondent to maintain Meadow Gold conditions for Meadow Gold production employees at the Farmer Jack plant. Accordingly, Respondent did not improperly change Meadow Gold employees' terms and conditions of employment when it transferred those employees to the Farmer Jack plant and compensated that at

<sup>12</sup> This theory may perhaps be characterized as one requiring the preservation of the status quo ante of origin.

<sup>13</sup> There would be additional important implications. For example, if the transferees should have been offered their previous terms and conditions of employment, might not all those Meadow Gold unit employees who choose not to transfer to Farmer Jack because of the lower wages and benefits be constructive discharges under traditional Board law?

<sup>14</sup> The parties disputed the applicability of a decision of an administrative law judge adopted by the Board in the absence of exceptions to the case at hand. The parties agree, however, that the decision is not binding precedent.

Farmer Jack rates. The General Counsel has therefore failed to sustain his burden of proof with respect to this allegation and I shall dismiss paragraph 12(b) of the complaint.

4. Complaint paragraph 12(c): The statements of General Manager Ward in February 1988 to Meadow Gold employees

There was little dispute concerning Ward's statements to employees as described above. Unless specifically noted, to the extent differences exist, I credit the two employees where they corroborate one another or Ward, but do not credit either employee witness where not so corroborated. It is clear that Ward's remarks were made to clerical employees in the controller's office—a locus of managerial authority—at a time when the clerical employees were contemplating the possible loss of union representation and the further loss of existing contract terms and conditions of employment. In such a setting the fact that the general manager's statements were labeled as his personal opinion does not shelter them from scrutiny nor ameliorate otherwise violative statements.

To the extent that Ward simply compared and contrasted the leveling and standardizing effect of the existing union contract's wages and benefits with a hypothetical flexible, merit based compensation system which would exist without union representation, Ward was not violating the Act. The General Counsel contends, however, that Ward promised employees "that Respondent would reward them with better wages and benefits if they were not represented by the Union after their move to the Farmer Jack Plant." (G.C. Br. at 16.) Such conduct, the General Counsel correctly notes, interferes with employees' Section 7 rights, thereby violating Section 8(a)(5) and (1) of the Act, and constitutes an attempt to directly deal with employees respecting matters properly the province of the Union thereby violating Section 8(a)(5) and (1) of the Act. *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985).

The issue in this aspect of the case then is one of fact. Indeed, the question is close. Clearly, if Cherti's version of events is credited, the General Counsel's burden of proof is sustained and a violation should be found. This is so because her version of Ward's remarks attributes to him direct promises of increased wages and benefits conditional only on the employees abandoning their union representation. McDonald, however, tended to corroborate Ward's testimony that he dealt with wage increases, only in the sense that rates without a union would be merit based rather than standardized and that some individuals could obtain increased wages under such a system.

Having considered the testimony of the three witnesses on the meeting and the record as a whole concerning its context and circumstances, I find that Ward went beyond the area of permissible employer statements and made impermissible promises of improved benefits to employees, if the Union and the contract were abandoned. I so find primarily based on the uncontested fact that Ward told the employees "a person could get higher benefits," absent union representation. While it may be fairly argued that Ward's statements about improved wages were merely a benign description of a different distribution of wages among employees of varying degrees of merit, such a defense does not reasonably lie as to promises of increased benefits. Employees could reasonably have been expected to conclude—as is customary in the

United States and was apparently true respecting Respondent's existing benefit system—that all employees, irrespective of merit, receive equal fringe benefits and, therefore, all employees would receive benefit increases if the Union were abandoned. Such a promise, given the increasing importance of nonwage benefits in employee compensation plans is neither subtle nor elusive nor deminimus. Indeed, the promise of an equal or superior health and welfare plan, if they would reject the union, by the employer to employees was one aspect of employer conduct violative of the Act in *Bay Area-Los Angeles Express*, supra.

Given all the above, I sustain paragraph 12(c) of the complaint. More particularly, I find that Respondent, through Ward in February 1988, violated Section 8(a)(5) and (1) and independently violated Section 8(a)(1) of the Act, by promising employees increased benefits if they abandoned the Union as described above.

5. Complaint paragraphs 5 and 6: The statements of Assistant Labor Relations Director Finnerty to employees in March 1988 that transfers could not be granted absent union agreement and the withholding of Farmer Jack transfers to Meadow Gold employees

Respondent announced at meetings with Meadow Gold employees that unless the Union agreed with its last proposal, Meadow Gold employees would not be able to transfer to the Farmer Jack unit, but would rather be laid off when their positions were abolished at Meadow Gold. Thereafter Respondent in fact refused to transfer employees in any formal sense. The meetings and the refusal to transfer employees were challenged by the General Counsel. Since the propriety of the refusal to transfer employees is relevant to the propriety of the earlier statements concerning it, the transfer issue is addressed initially below.

a. Complaint paragraph 6: The layoffs and transfers

As described above, when Respondent and the Union failed to reach agreement on terms and conditions of employment respecting the closure of the Meadow Gold production unit and the consolidation at the Farmer Jack facility, Respondent did not implement its final offer but rather simply laid off employees in the Meadow Gold unit when their work was concluded at the Meadow Gold facility. The exception to this process was that a significant number, although not necessarily all Meadow Gold production employees, were given the opportunity to transfer to the Farmer Jack unit by following the procedures described, supra. I have found the layoff and rehire procedures were tantamount to a transfer of employees. I reject any contrary characterization by Respondent. These transfers were treated as new hires at the Farmer Jack facility with respect to their terms and conditions of employment. The terms of Respondent's last offer were not applied to them. The transferees received no transfer payments, carried no seniority and received no credit for Meadow Gold service in establishing their Farmer Jack wages—save in that they were considered to have nonunion experience in the industry. In this sense, they were denied specific benefits of transfer which they would have received if Respondent's last offer had been implemented.

The General Counsel alleges Respondent's failure to transfer the Meadow Gold employees, consistent with its last

offer to the Union, is a violation of Section 8(a)(3) and (1) of the Act. The General Counsel concedes on brief that Respondent “was neither contractually nor statutorily obligated to transfer the Meadow Gold employees to the Farmer Jack plant.” The thrust of the General Counsel’s argument is that Respondent’s conduct herein was part of an illegal course of conduct designed to coerce the Union into consenting to Respondent’s wrongful assumption of the Borman Farmer Jack contract. When the Union would not agree, argues the General Counsel on brief at 21:

[Respondent] attempted to force the Union to grant this consent by threatening the Meadow Gold employees with layoff. In effect, Respondent was holding the Meadow Gold employees hostage to its intransigent demand that it be allowed to assume the old Farmer Jack agreement.

Respondent argues that there is no evidence of animus respecting this conduct and, absent such a finding, no violation of Section 8(a)(3) of the Act may be found. Respondent further argues that its conduct resulted from the lack of agreement during effects bargaining concerning the Meadow Gold closure and that both its bargaining and its actions respecting Meadow Gold unit employees at the Farmer Jack plant were proper under the Act.

I have found, *supra*, that Respondent did not violate the Act as alleged in paragraph 12(a) of the complaint by assuming the Borman Farmer Jack contract. The General Counsel did not separately allege a failure to bargain respecting the new Farmer Jack unit but that broad allegation may be fairly held to be implicit in the other allegations of the complaint. Has the General Counsel met its burden of proof that Respondent bargained in bad faith respecting the new consolidated Farmer Jack unit?

No contention has been made that Respondent failed to satisfy the procedural obligations of good-faith bargaining such as meeting with the Union on demand. Respondent proposed both initially and virtually throughout the bargaining, that the parties, in effect, sign a new contract which mirrored the Borman contract save in certain noneconomic matters which were designed to accommodate the Meadow Gold unit transferees. The Union however, especially in the bargaining preceding the transfers, proposed few if any changes in the terms and conditions of original or non-Meadow Gold Farmer Jack unit employees. I find no real dispute that, leaving out the category of employees discussed below and characterized here as Meadow Gold unit transferees, there was no significant dispute between the parties about the Farmer Jack unit at least until late in bargaining and no sustainable contention that Respondent’s bargaining was in violation of the Act respecting that unit.

The strong and continuing differences between the Union and Respondent concerned the Meadow Gold employees and the contract terms and conditions they would carry with them to the Farmer Jack facility in the form of changes to that contract. This bargaining may be characterized with some accuracy as either effects bargaining respecting the Meadow Gold unit or perhaps bargaining concerning the new merged unit. It was not bargaining concerning the old Farmer Jack unit employees except indirectly to the extent that those employees’ conditions would be modified to combine seniority

and other rights with Meadow Gold transferees. The Union sought in bargaining to carry over the Meadow Gold contract terms, at least for the transferees from the Meadow Gold unit, into a new Farmer Jack contract—via “red circled rates.” Respondent, while willing to accede to the Union’s proposals respecting seniority, sought to preserve the very favorable economic terms of the Borman contract in any new contract by refusing to make any economic concessions regarding Meadow Gold transferees once working in the Farmer Jack unit. Respondent sought to achieve its goal—setting aside the noneconomic concessions respecting seniority—by limiting its proposals and concessions in the effects bargaining concerning the Meadow Gold employees to one-time transfer and separation payments for Meadow Gold employees which would not effect transferee’s terms and conditions of employment once at the Farmer Jack plant.

The General Counsel’s allegation that Respondent bargained in bad faith respecting the Farmer Jack unit must then be considered as a more general allegation that Respondent bargained in bad faith concerning the new merged unit. In considering that allegation Respondent’s position and concessions respecting the Meadow Gold effects bargaining must also be considered for, as noted above, these proposals are part and parcel of the merged unit bargaining. Considering the bargaining as a whole, including the proposals of Respondent for Meadow Gold severance and transfer payments, I find that the General Counsel has failed to sustain his burden of proof that Respondent bargained in bad faith. Respondent actively sought to preserve for itself the concessions earlier granted to Borman. It sought to do so in the merged unit by its limiting concessions to one-time payments which would not raise the wage rates of any employee once working at the Farmer Jack facility. Neither Respondent’s goal nor its chosen means of achieving that goal are evidence of bad faith. Since neither Respondent’s means nor ends in bargaining were improper and since it met the procedural requirements for bargaining, no violation of Section 8(a)(5) and (1) of the Act may be found. As noted elsewhere in this decision, Respondent violated Section 8(a)(1) and (5) and (1) of the Act by making improper and illegal statements to employees respecting bargaining and union representation. The totality of this conduct away from the bargaining table, however, does not rise to a level sufficient to independently sustain a general failure to bargain in violation of Section 8(a)(5) of the Act.

Having found no violation of Section 8(a)(5) of the Act in Respondent’s bargaining, it follows that the General Counsel’s allegation that Respondent violated Section 8(a)(3) and (1) of the Act by laying off some Meadow Gold employees and transferring others must fail. The General Counsel does not contend Respondent had an obligation, statutory or contractual, to transfer Meadow Gold employees to the Farmer Jack facility. The allegation turned on the further allegation that Respondent took the action in furtherance of a course of conduct violative of the Act. Having found the underlying bargaining not illegal, it follows the General Counsel’s *prima facie* case as to the transfers fails and I so find.<sup>15</sup> Accordingly, I shall dismiss this allegation of the complaint.

<sup>15</sup> In the typical situation wherein a union has proposed substantial wage increases in bargaining and the employer has agreed to those

*Continued*

*b. Complaint paragraph 5 as a violation of Section 8(a)(1) of the Act and a direct dealing violation of Section 8(a)(5) and (1) of the Act: The threat to lay off and/or refuse to transfer employees unless the Union accepted Respondent's last offer*

There is essentially no dispute that the employee meetings held on March 9 and 10, 1988, were intended by Respondent to generate employee pressure on the Union to accept Respondent's last proposal concerning the Meadow Gold closure and the consolidation of operations at the Farmer Jack facility. More specifically, Respondent's agents sought to induce employee attempts to obtain a ratification vote and ratify Respondent's offer at the forthcoming union meeting scheduled for the evening of March 10, 1988.

The inducements to employees to act with alacrity were both carrot and stick. Respondent's agents described their proposal which included substantial employee transfer and severance payments—carrots with an immediate cash value. They also stated that, unless the proposal was accepted by the Union “very, very soon,” Respondent would be forced to lay off the Meadow Gold employees without transfer rights or severance pay and to hire new employees “off the street” for the Farmer Jack positions—the stick of seniority loss and the threat of unemployment. Respondent clearly told employees that Respondent could not do otherwise, i.e., it had no choice in the matter unless and until its proposal was accepted by the Union. There is also no dispute, and I find, that these statements to the employees were false in that Respondent was under no compulsion to take the actions that it claimed it would be forced to take.

The General Counsel argues that Respondent's conduct constitutes an unlawful threat in violation of Section 8(a)(1) of the Act and, further, was an attempt to bypass the Union and deal directly with unit employees in violation of Section 8(a)(5) and (1) of the Act.<sup>16</sup> The two allegations depend on the same facts but different legal analysis and deserve separate treatment.

increased wages or proposed increases of a different level, the employer often refuses to implement the increases until an entire new contract is agreed to. The motivation is, of course, to withhold the wage increase to employees as a bargaining tactic to pressure the union to quickly come to agreement and thus obtain the increases. This rather common bargaining strategy is not a violation of the Act. In the instant case, Respondent's conduct may be similarly seen as an attempt to withhold the benefits of a proposal until complete agreement is reached in order to induce pressure for union acceptance. The Board finds no violation in such cases.

<sup>16</sup> Counsel for the General Counsel (G.C. Br. at 22 fn. 2) concedes this conduct was not specifically alleged in the complaint as a violation of Sec. 8(a)(5) and (1) of the Act, but argues it was “unlawful activity . . . related to and intertwined with the allegations of the complaint” and was fully litigated and may therefore be found to be a violation of Sec. 8(a)(5) and (2) of the Act as well as a violation of Sec. 8(a)(1) of the Act as specifically alleged in the complaint citing *Doral Hotel & Country Club*, 240 NLRB 1112 fn. 2 (1979); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1081 (1985). The General Counsel's cited cases are persuasive on the issue and I shall consider the direct dealing allegation as if pled.

(1) Respondent's conduct as an independent violation of Section 8(a)(1) of the Act

The General Counsel argues, in parallel with his argument in support of the 8(a)(3) contentions described above, that Respondent's threats to deny transfer rights to Meadow Gold employees were undertaken to frustrate the bargaining process and avoid its bargaining obligation. The General Counsel argues on brief that Respondent “attempted to substitute a threat of termination for good faith negotiations. In doing so, Respondent violated Section 8(a)(1) of the Act.”

Respondent argues that its “threat,” that employees would be laid off unless the Union accepted Respondent's final offer, was not improper unless the layoffs themselves were improper. Respondent argues on brief: “[I]t is not unlawful to threaten to do what one can, in fact, lawfully do.” I agree. I have found, *supra*, that Respondent did not in fact violate Section 8(a)(3) and (1) of the Act in refusing to transfer the Meadow Gold employees as alleged in the complaint. It follows, therefore, that Respondent's statements to employees do not violate Section 8(a)(1) of the Act as alleged in the complaint. I shall therefore dismiss paragraph 5 of the complaint.

(2) Respondent's conduct as a violation of Section 8(a)(5) and (1) of the Act

The General Counsel contends that Respondent's conduct was also an attempt to bypass the Union and deal directly with Meadow Gold employees. The law in this area was aptly summarized by Judge Pollack, with Board approval, in *Ad-Art, Inc.*, 290 NLRB 590, 606 (1988), as follows:

Section 8(a)(5) creates an obligation on the part of an employer to bargain with an incumbent union as the exclusive bargaining representative of its employees in the matter of wages, hours, terms and conditions of employment. It may not attempt to circumvent the exclusive status of the bargaining agent by attempting to deal directly with its represented employees. *Medo Photo Supply v. NLRB*, 321 U.S. 678 (1944). An employer must deal in bargaining negotiations with the statutory representative and cannot bargain directly or indirectly with the employees. *NLRB v. Insurance Workers*, 361 U.S. 477, 484–485 (1960). “The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees.” *General Electric Co.*, 150 NLRB 192, 195 (1964).

In *Ad-Art* the Board found a violation of Section 8(a)(5) and (1) of the Act when the employer “sought to exert pressure on the Union by offering a wage increase to the employees and by threatening the employees with a loss of work opportunities if the Respondents' offer was not accepted,” 290 NLRB at 606. In the instant case in order to exert pressure on the Union to accept its final offer, Respondent sought to stimulate employee efforts to bring the proposal before the membership for ratification. Respondent accomplished this by falsely telling employees that, unless the Union accepted the offer, Respondent was powerless to do other than lay off the Meadow Gold employees and hire



other new employees "off the street" for the vacancies at the Farmer Jack plant.

Respondent's goal and its means were improper and together constitute a violation of Section 8(a)(5) and (1) of the Act. As the cases cited indicate, Respondent was obligated to deal with the Union, not employees, in bargaining. Indeed, a union's submission of contracts for ratification by its members is a matter of internal union business, a nonmandatory subject of bargaining and a matter of legitimate concern to the Union and its members only. Respondent could not properly insist that its proposal be submitted to the union membership for consideration nor could Respondent properly seek to achieve such a result through pressure on the employees.

Second, Respondent's statements to employees were improper. As the General Counsel concedes on brief with case citation, "an employer has a fundamental right to communicate with its employees concerning its position in collective-bargaining negotiations." Rather, than simply inform employees of the positions of the parties, however, Respondent, through Finnerty, Respondent's assistant director of labor relations, falsely stated that unless the Union accepted its last offer, Respondent had no choice but to lay off employees, omit severance and transfer payments and hire new job applicants for Farmer Jack vacancies. These statements, exactly like those of the employer found violative in *Ad-Art*, supra, falsely tell employees that actions adverse to employees may be avoided only by the Union agreeing with the employer's demands. The obvious truth, however, and one which must reasonably have been known to Finnerty and Respondent's other officials, but clearly was not so understood by the employees, was that a variety of options were available to Respondent whether the Union accepted Respondent's last offer or not.

I find that Respondent's false statements to employees were designed to create and did create the mistaken belief among the employees that, absent union agreement with Respondent's last offer, Meadow Gold unit employees would, of necessity, be laid off and lose both severance and transfer payments and job opportunities. I further find that these false impressions were created by Respondent in order to induce employee efforts to bring Respondent's last offer before the union membership for approval and/or to create further employee efforts with the International to induce union agreement. In the event Respondent's efforts were successful insofar as employee actions, as noted above, were induced. Respondent's conduct, involving first, the communication of willful falsehoods to employees concerning the consequences of the Union's refusal to accept Respondent's last offer and, second, involving the inducement of employee efforts concerning ratification of the proposal and subsequent efforts to cause the International to pressure the Union to accept the employer's proposal, constitute an improper attempt to bargain with the Union through the employees in violation of Section 8(a)(5) and (1) of the Act. I so find.

#### 6. Summary

As set forth above, I have considered the allegations of the complaint as well as the additional allegation that the conduct alleged in paragraph 5 violated Section 8(a)(5) and (1) of the Act. I have sustained the General Counsel's allegations as to the 8(a)(5) and (1) aspect of complaint paragraph 5 as well as paragraph 12(c) of the complaint. I have other-

wise found without merit paragraphs 5, 6, and 12(a) and (b) of the complaint and shall dismiss these paragraphs. No other action paragraphs remain to be resolved. Further, I have rejected the argument of the Charging Party that the Farmer Jack unit accreted into the Meadow Gold unit and hence was covered by the Meadow Gold collective-bargaining agreement.

More specifically, I have found that Respondent in meetings in February and March 1988, attempted to bypass the Union and undermine its representational role among Meadow Gold unit employees by dealing directly with unit employees concerning terms and conditions of employment as described in greater detail above. This conduct violates Section 8(a)(5) and (1) of the Act and shall be remedied as set forth infra. I have also found that the February offer of improved benefits to the Meadow Gold clerical employees, if they abandoned the Union, also violated Section 8(a)(1) of the Act.

I have found that Respondent did not improperly threaten to deny transfer rights to unit employees in violation of Section 8(a)(1) of the Act and did not improperly withhold the transfer of employees in violation of Section 8(a)(3) and (1) of the Act as alleged. Further, I have found that Respondent did not improperly assume the Borman Farmer Jack agreement or improperly apply the Farmer Jack working conditions to Meadow Gold unit transferees in violation of Section 8(a)(5) and (1) of the Act as alleged.

#### IV. REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefore and take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be required to cease and desist from bargaining directly or attempting to bargain directly with employees during negotiations with the Union which conduct results in bypassing the Union and/or undermining its role as the exclusive representative of unit employees. Further, Respondent shall be ordered to cease and desist from offering improved benefits to employees if they will abandon the Union. More specifically, Respondent shall cease and desist from telling unit employees that terms and conditions of employment will be improved if the Union no longer represents employees. Respondent shall also cease and desist from making misrepresentations of fact or law to employees concerning negotiations which falsehoods tend to undermine the Union's representational role. Finally, since the violations found involve clerical employees at the Meadow Gold site and employees now at the Farmer Jack site, posting shall be directed at both locations.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been, until the unit consolidation occurring over a period of months ending in October 1988, the exclusive representative of Respondent's employees in two units as described below.

#### (a) The Meadow Gold Unit

All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective-bargaining agreement between Respondent and the Central and Southern Conference of Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters.

(b) The Old Farmer Jack Unit

All employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/ Cultured Products Plants Agreement between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992.

4. The Union since the consolidation of units described above has been and is now the exclusive representative of Respondent's employees in the unit described below (the New Consolidated Farmer Jack unit).

All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective-bargaining agreement between Respondent and Central and Southern Conference Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/ Cultured Products Plants Agreement Between Borman's

Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

5. The units described above are and each of them is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. By offering employees increased benefits if they abandoned union representation, Respondent violated Section 8(a)(1) of the Act.

7. By attempting to deal directly with unit employees in February and March 1988 by promising them better terms and conditions of employment, if they abandoned the Union, and by making material misrepresentations of the necessity of withholding employee rights to transfer to another facility unless the Union accepted Respondent's last offer, in order to induce employee pressure on the Union to accept Respondent's last offer, Respondent attempted to bypass the Union, thereby undermining its role as the exclusive representative of employees in collective bargaining and, in so doing, Respondent violated Section 8(a)(5) and (1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not otherwise violated the Act as alleged in the complaint.

[Recommended Order omitted from publication.]